

INDEX

	Page
Statement	1
Summary of Argument.....	3
Argument:	
The delegation of authority to the Secretary of Defense to designate "defense facilities" is constitutional.....	4
Conclusion	12
Appendix	13

CITATIONS

Cases:

<i>A.L.A. Schechter Poultry Co. v. United States</i> , 294 U.S. 495..	5
<i>Avent v. United States</i> , 266 U.S. 127.....	9
<i>Bowles v. Willingham</i> , 321 U.S. 503.....	6, 8
<i>Cox v. United States</i> , 332 U.S. 442.....	2
<i>Dakota Central Telephone Co. v. South Dakota</i> , 250 U.S. 163	8
<i>Fahey v. Mallonee</i> , 332 U.S. 245.....	6
<i>Hirabayashi v. United States</i> , 320 U.S. 81.....	6, 8, 9, 11
<i>Lichter v. United States</i> , 334 U.S. 742.....	6
<i>New York Central Securities Corp. v. United States</i> , 387 U.S.	
12	9
<i>Scarbeck v. United States</i> , 317 F.2d 546.....	8
<i>Tagg Bros. v. United States</i> , 280 U.S. 420.....	9
<i>Union Bridge Co. v. United States</i> , 204 U.S. 364.....	5
<i>United States v. Carolene Products Co.</i> , 304 U.S. 144.....	2
<i>United States ex rel Knauff v. Shaughnessy</i> , 338 U.S. 537....	6, 8
<i>United States v. Rock Royal Co-operative</i> , 307 U.S. 533....	6
<i>Yakus v. United States</i> , 321 U.S. 414.....	2, 5, 6, 8
<i>Zemel v. Rusk</i> , 381 U.S. 1.....	9, 11

Statutes:

Pub. L. 87-474, 76 Stat. 91.....	11
Subversive Activities Control Act of 1950, 64 Stat. 987, as amended, 50 U.S.C. 781 <i>et seq.</i>	2, 7, 13
Section 2.....	7
Section 3.....	13
Section 3(5).....	13

Statutes—Continued

	Page
Section 3(7).....	2, 6, 10, 13
Section 4.....	7
Section 5(a).....	2, 4, 14
Section 5(b).....	3, 4, 10, 11, 15
Section 15.....	15
Section 101.....	7
18 U.S.C. 798.....	8

Miscellaneous:

Department of Defense Press Release No. 1363-62, issued August 20, 1962.....	11
Hearing before the House Committee on Un-American Activities, 87th Cong., 2d Sess., entitled "Hearing Relating to H.R. 9753, to Amend Sections 3(7) and 5(b) of the Internal Security Act of 1950, as Amended, Relating to Employment of Members of Communist Organizations in Certain Defense Facilities".....	10
H. Rep. No. 1362, U.S. Code Cong. and Admin. News, 87th Cong., 2d Sess., 1962, Vol. 1.....	10
S. Rep. No. 1443, U.S. Code Cong. and Admin. News, 87th Cong., 2d Sess., 1962, Vol. 1.....	10

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 8

UNITED STATES OF AMERICA, APPELLANT

v.

EUGENE FRANK ROBEL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES ON REARGUMENT

STATEMENT

On June 5, 1967, the Court entered the following order in this case:

This case is restored to the calendar for reargument and counsel are directed to brief and argue, in addition to the questions presented, the question whether the delegation of authority to the Secretary of Defense to designate "defense facilities" satisfies pertinent constitutional standards.

We here address ourselves to this additional question, without attempting to reargue the issues in the case

covered in our brief on the merits submitted last Term.¹ Nor do we deem it necessary to restate the facts of the case.

In summary, the scheme of the Subversive Activities Control Act of 1950 (64 Stat. 987, as amended, 50 U.S.C. 781, *et seq.*);² insofar as it relates to our case, is as follows. Section 5(a) makes it unlawful for any member of a Communist-action organization³ to seek employment or to be employed in a defense facility, so designated by the Secretary of Defense. Section 3(7) defines a "facility" as "any plant, factory or other manufacturing, producing or service establishment, airport, airport facility, vessel, pier, water-front facility, mine, railroad, public utility, laboratory, station, or other

¹ We do add this brief comment. Appellee, in his original brief, challenged the Act on due process grounds because it deprived him of the right to have the jury pass on the validity of the Board's determination that the Communist Party is a "Communist-action organization" or the reasonableness of the Secretary's action in designating the Todd Shipyards as a "defense facility." Since the Act gives the Party, or a registered member, the right to periodically contest the Board's determination and to obtain judicial review of that determination (Sections 13 and 14) there would seem to be no need for further review in the criminal trial. See *Yakus v. United States*, 321 U.S. 414. In any event, to the extent that appellee is entitled to show that the findings of the Board and the Secretary are so bereft of factual support that they provide no rational basis for the enforcement of the Act, see *United States v. Carolene Products Co.*, 304 U.S. 144, the question presented would be one for the judge to decide on motion, rather than an issue for the jury. *Cox v. United States*, 332 U.S. 442.

² The pertinent provisions of the statute are set out in full in the Appendix, *infra*, pp. 13-15.

³ Under the statute, Section 5(a) (1) (D) could not become effective until there was a "Communist organization" within the statutory definition, i.e., one that is registered or concerning which there is in effect a final order to register pursuant to the Internal Security Act of 1950. Thus, the effective date of Section 5(a) was delayed until the registration order became final on October 20, 1961.

establishment or facility, or any part, division, or department of any of the foregoing," and defines "defense facility" as any facility designated by the Secretary of Defense pursuant to Section 5(b). Section 5(b) authorizes and directs the Secretary of Defense to designate any "facility" as a "defense facility" upon a finding and determination that "the security of the United States requires the application of the provisions of subsection (a)."

SUMMARY OF ARGUMENT

In enacting the Subversive Activities Control Act, Congress clearly expressed its intention to protect facilities vital to the national defense from espionage and sabotage by precluding members of Communist-action organizations from employment therein. In leaving the determination of which particular facility required this protection to the Secretary of Defense, Congress was merely conferring on the Secretary the duty to determine the facts upon which the enforcement of its enactment would depend. Such a delegation of power has long been recognized as a proper and, indeed, necessary method of legislating. Moreover, even if the original delegation of power to the Secretary was not sufficiently precise to meet the constitutional standard, the subsequent amendment of the statute by Congress, with full knowledge of the standards adopted by the Secretary for designating defense facilities, constituted an adoption of those standards by Congress and cures any overbreadth in the original delegation.

ARGUMENT

The Delegation of Authority to the Secretary of Defense to Designate "Defense Facilities" Is Constitutional

At the outset, we emphasize that the question of delegation in this case involves only the doctrine of separation of powers. There is, as to the appellee, no issue of adequate notice or of fair warning. Indeed, whether or not the statute in suit fails sufficiently to define the limits of the Secretary's discretion, the legislative text itself makes clear that certain installations obviously vital to the national security will be covered—and it is hardly debatable that a major shipyard is within that description. But, in any event, appellee cannot complain that the statute punishes without warning since the provision invoked against him imposes liability only after a written notice has been posted disclosing that the employer's enterprise has been designated by the Secretary of Defense as a defense facility. Section 5(b) (Appendix, *infra*, p. 15).⁴ Moreover, here, the indictment expressly alleges that appellee had actual knowledge that Todd Shipyards had been so designated (R. 2).

So saying, we do not intend to denigrate the interest of every citizen in the constitutional rule that truly legislative powers must be exercised by the legislative branch alone; nor do we challenge appellee's standing to invoke that rule here. On the other hand, it seems appropriate to stress that the question of delegation, in the present context, presents no question of

⁴ Before any penalty attaches under Section 5(a), the employee must also know that the organization to which he belongs has been finally determined to be a "Communist-action organization."

fairness to the particular appellee. With this preface, we turn to consider whether the delegation of authority to the Secretary of Defense to designate defense facilities satisfies the constitutional standard.

There can be no dispute that the Constitution prohibits Congress from abnegating its legislative responsibility by an unwarranted delegation of legislative power to the Executive. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495. But it does not follow that Congress may never delegate authority to make subsidiary determinations. As the Court observed in *Yakus v. United States*, 321 U.S. 414, 424:

The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate. . . .

The necessity for such a flexible rule was authoritatively stated in *Union Bridge Co. v. United States*, 204 U.S. 364. After canvassing the prior cases involving delegation of power to the Executive, the Court there concluded at 387:

Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its

enactment depends would be "to stop the wheels of government" and bring about confusion, if not paralysis, in the conduct of the public business.

Thus, it has been consistently held that there is no unlawful delegation of congressional power where the act which confers power on the executive sets forth, so far as reasonably practicable, the legislative purpose and an intelligible principle to govern the implementation of that purpose. *Lichter v. United States*, 334 U.S. 742; *Yakus v. United States*, *supra*; *Hirabayashi v. United States*, 320 U.S. 81; *United States v. Rock Royal Co-operative*, 307 U.S. 533, 574; *Fahey v. Mallonee*, 332 U.S. 245; *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537. In other words, "Congress does not abdicate its functions where it describes what job must be done, who must do it, and what is the scope of his authority." *Bowles v. Willingham*, 321 U.S. 503, 515.

Applying these principles to the present case, it is evident that there has been no unconstitutional delegation of congressional power to the Secretary of Defense. The only determination which the statute leaves to the Secretary is whether a "facility" as defined in Section 3(7) should be designated a "defense facility". And the Secretary may make such a designation only if he "finds and determines that the security of the United States requires the application" of the protective provisions of subsection (a) to such facility. Viewing this standard "in [the] light of the conditions to which they are to be applied," as we must (*Lichter v. United States*, *supra*, 334 U.S. at 785), it seems plainly sufficient.

1. The Internal Security Act of 1950 as a whole clearly discloses the congressional purpose to be effectuated and provides reasonable guides for the Secretary in determining when "the security of the United States" requires him to designate a facility as a defense facility. Section 2 of the Act sets forth detailed findings concerning the worldwide Communist movement, which Congress concluded presented a clear and present danger to "the security of the United States." Section 2(15). Included was the finding that "[t]he agents of communism have devised clever and ruthless espionage and sabotage tactics." Subsection 11. In addition, Title II of the Act contained a congressional finding that "[t]he security and safety of the territory and Constitution of the United States * * * require every reasonable and lawful protection against espionage, and against sabotage to national-defense material, premises, forces, and utilities, including related facilities for mining, manufacturing, transportation, research, training, military and civilian supply, and other activities essential to national defense." Section 101(11). These findings unmistakably proclaim the policy of Congress to protect vital facilities from espionage and sabotage by members of Communist-action organizations and supply reasonable guidelines to determine when, in the intendment of Congress, the security of the United States would require the exclusion of members of Communist action groups from employment in a particular facility.⁵

⁵ It is significant to note that determinations based on an assessment of what is necessary to the "security of the United States" are not peculiar to the provision in issue here. Section 4 of the Act, subsections (b) and (c), provides criminal penalties for the com-

Since Congress did no more than give the Secretary the power to determine when the facts justified the implementation of the legislative purpose, there was no unconstitutional delegation of congressional power. "The essentials of the legislative function are preserved when Congress authorizes a statutory command to become operative upon ascertainment of a basic conclusion of fact by a designated representative of Government." *Hirabayashi v. United States*, 320 U.S. 81, 104.

This case is no different from many others in which this Court has sustained the power of Congress to delegate fact-finding functions to executive agencies. Thus, in *Bowles v. Willingham*, 321 U.S. 503, the Court sustained the delegation to the Administrator of the Office of Price Administration of the power to stabilize or reduce rents "[w]henever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purpose of this Act." Similarly, in *Yakus v. United States*, 321 U.S. 414, the Court found nothing improper in conferring on the Price Administrator the power to promulgate regulations fixing prices of commodities which "in his judgment will be generally fair and equitable and will effectuate the purpose of this Act." See, also, *United States ex rel. Knauff v.*

munication or receipt of information which has been classified "as affecting the security of the United States." See *Scarbeck v. United States*, 317 F.2d 546 (C.A. D.C.). Similarly, 18 U.S.C. 798 makes criminal the unauthorized disclosure of certain information "for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination of distribution." See, also, *Dakota Central Telephone Co. v. South Dakota*, 250 U.S. 163, in which this Court sustained the enforcement of a statute giving the President the power in time of war to seize telephone and telegraph facilities "whenever he shall deem it necessary for the national security."

Shaughnessy, 338 U.S. 537 (sustaining the grant of power to the President "upon finding that the interests of the United States required it, [to] impose additional restrictions and prohibitions on the entry into and departure of persons from the United States"); *Hirabayashi v. United States*, 320 U.S. 81, 86 (sustaining a conviction for violating a curfew imposed pursuant to an Act of Congress which did "authorize and direct the Secretary of War, and the Military Commanders * * * whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any and all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion"); *New York Central Securities Corp. v. United States*, 287 U.S. 12; *Tagg Bros. v. United States*, 280 U.S. 420; *Avent v. United States*, 266 U.S. 127.

2. Even if the initial delegation of power to the Secretary of Defense had not constituted a sufficiently precise delineation of congressional purpose to satisfy the constitutional test, the defect would be cured by the subsequent amendment of a portion of the statute by Congress, with full knowledge of the standards which the Secretary of Defense would use in designating defense facilities. See *Zemel v. Rusk*, 381 U.S. 1, 17-18; *Hirabayashi v. United States*, 320 U.S. 81.

In early 1962, H.R. 9753 was introduced in Congress

to amend Sections 3(7) and 5(b) of the Internal Security Act of 1950. The purpose of this bill was to delete the requirement that the Secretary publish a list of the designated defense facilities in the Federal Register.⁶ The representative of the Secretary of Defense who appeared before the Committee on Un-American activities in support of the bill expressed the fear that the publication of a list of defense facilities would provide a target list for potential sabotage.⁷ He further informed the Committee that a tentative list of facilities deemed so vital as to require the application of the provision of the Act barring members of Communist organizations had been prepared and included facilities engaged in the following activities:

- (1) top secret projects;
- (2) production of the most essential weapons systems and most critical military end items and components;⁸
- (3) production of essential common components, intermediates, and basic and raw materials; and
- (4) important utility and service facilities and

⁶ Hearings Before the House Committee on Un-American Activities, 87th Cong., 2d Sess., entitled "Hearing Relating to H.R. 9753, to Amend Sections 3(7) and 5(b) of the Internal Security Act of 1950, as Amended, Relating to Employment of Members of Communist Organizations in Certain Defense Facilities." H. Rep. No. 1362 (to accompany H.R. 9753), 87th Cong., 2d Sess.; and S. Rep. No. 1443, U.S. Code Cong. and Admin. News, 87th Cong., 2d Sess., 1962, Vol. 1, pp. 1661-1666.

⁷ Statement of Assistant General Counsel, Department of Defense before the House Committee on Un-American Activities, S. Rep. No. 1443 and H. Rep. No. 1362, U.S. Code Cong. and Admin. News, 87th Cong., 2d Sess., 1962, Vol. 1, pp. 1664-1665; and H. Rep. No. 1362, pp. 6-7.

⁸ An explanation of "components" is in our original brief, at p. 27, n. 10.

other industrial and research installations whose operations and contributions to the national defense efforts are of utmost importance.

He further informed the Committee that "[t]his list is made up of facilities which are so essential to the interests of national security as to require the exclusion of members of Communist organizations required to register under the Act."

Being fully advised of the interpretation given the statute by the Secretary of Defense, as shown in the reports from the two Committees, Congress on May 31, 1962, enacted H.R. 9753 and amended Section 5(b) to delete the requirement that the "list" of defense facilities be published in the Federal Register (Pub. L. 87-474, 76 Stat. 91), but did not change the standards to be used by the Secretary in designating defense facilities. This congressional ratification of the standards adopted and applied by the Secretary⁹ (see *Hirabayashi v. United States*, 320 U.S. 81, 91; *Zemel v. Rusk*, 381 U.S. 1, 17-18) fully answers any claim that the Secretary of

⁹ The Department of Defense on August 20, 1962, announced action by the Secretary of Defense to implement these provisions of the Internal Security Act, as amended, and described the types of facilities to be designated pursuant to Section 5(b), as follows:

1. Facilities engaged in important classified military projects.
2. Facilities producing important weapons systems, subassemblies and their components.
3. Facilities producing essential common components, intermediates, basic materials and raw materials.
4. Important utility and service facilities.
5. Research laboratories whose contributions are important to the national defense.

Dept. of Defense Press Release No. 1363-62, issued August 20, 1962; App. A to our original brief on the merits, Oct. Term, 1966, pp. 58-59 *infra*.

Defense has been left too much at large by the original delegation. No doubt remains that Congress itself determined to impose a penalty on those in appellee's situation.

CONCLUSION

For the reasons stated here and in our brief filed last Term, it is respectfully submitted that the judgment of the court below should be reversed.

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AUGUST 1967.

APPENDIX

STATUTE INVOLVED

The Subversive Activities Control Act of 1950, 64 Stat. 987, as amended, 50 U.S.C. 781, *et seq.*, provides in pertinent part:

Sec. 3. For the purposes of this title—

(3) The term "Communist-action organization" means—

(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title; * * *

(5) The term "Communist organization" means any Communist-action organization, Communist-front organization, or Communist-infiltrated organization.

(7) The term "facility" means any plant, factory or other manufacturing, producing or service establishment, airport, airport facility, vessel, pier, water-front facility, mine, railroad, public utility, laboratory, station, or other establishment

or facility, or any part, division, or department of any of the foregoing. The term "defense facility" means any facility designated by the Secretary of Defense pursuant to section 5(b) of this title and which is in compliance with the provisions of such subsection respecting the posting of notice of such designation.

Sec. 5. (a). When a Communist organization, as defined in paragraph (5) of section 3 of this title, is registered or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful—

(1) For any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(A) in seeking, accepting, or holding any non-elective office, or employment under the United States, to conceal or fail to disclose the fact that he is a member of such organization; or

(B) to hold any nonelective office or employment under the United States; or

(C) in seeking, accepting, or holding employment in any defense facility, to conceal or fail to disclose the fact that he is a member of such organization; or

(D) if such organization is a Communist-action organization, to engage in any employment in any defense facility; or

(b) The Secretary of Defense is authorized and directed to designate facilities, as defined in paragraph (7) of section 3 of this title, with respect to the operation of which he finds and determines that the security of the United States requires the application of the provisions of subsection (a) of this section. The Secretary shall promptly notify the management of any facility so designated, whereupon such management shall immediately post conspicuously notice of such designation in such form and in such place or places as to give notice thereof to all employees of, and to all applicants for employment in, such facility. Such posting shall be sufficient to give notice of such designation to any person subject thereto or affected thereby. Upon the request of the Secretary, the management of any facility so designated shall require each employee of the facility, or any part thereof, to sign a statement that he knows that the facility has, for the purposes of this title, been designated by the Secretary under this subsection.

The pertinent portion of Section 15, 50 U.S.C. 794, the penalty provision, reads:

(c) * * * Any individual who violates any provision of [section 5] * * * of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than \$10,000 or by imprisonment for not more than five years, or by both such fine and imprisonment.